FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of the Petition of	)	
The United States Telecom Association	)	
For a Rulemaking to Amend Pole	)	RM No. 11293
Attachment Rate Regulation and	)	
Complaint Procedures	)	

REPLY COMMENTS OF AT&T INC.

AT&T Inc. ("AT&T"), on behalf of its affiliates, respectfully submits these reply comments in support of the petition of the United States Telecom Association ("USTelecom") for a rulemaking to amend the Commission's poles, ducts, conduits, and rights-of-way regulations. The electric utilities are simply wrong to suggest that incumbent local exchange carriers ("ILECs") enjoy an equal bargaining position with pole owners and that there is no need for regulatory intervention to resolve disputes over the terms and conditions of pole attachments.[1]

AT&T firmly believes that, whenever possible, the Commission should rely upon market forces and arms'-length negotiations between commercial entities to ensure just and reasonable rates, terms, and conditions for services and access to facilities.[2] In rare instances, however, as the Commission has long recognized, market forces break down and Commission intervention is required. As AT&T explains below, the parity that ILECs once enjoyed with electric utilities has long since disappeared, and ILECs, as attaching entities, ought to have the same rights as any other carrier to invoke the Commission's authority to resolve disputes where market forces do not operate

[1] *See, e.g.*, Comments of the United Telecom Council and the Edison Electric Institute at 18; Joint Opposition of American Electric Power Service Corporation, Duke Energy Corporation, WPS Resources Corporation, and Xcel Energy Inc. at 16-19; Opposition of FirstEnergy at 4-6, 11-15.

[2] *See also* Comments of BellSouth at 10 (recognizing negotiations are generally preferable to Commission intervention).

effectively. At the very least, the record already developed in this proceeding justifies this Commission's undertaking the fuller investigation of this issue that a rulemaking allows. Because the credible legal arguments and ample evidence presented in USTelecom's petition and the comments "disclose[ ] sufficient reasons in support of the action requested to justify the institution of a rulemaking proceeding,"[3] the Commission should grant the petition and issue a notice of proposed rulemaking.

I. The Historical Pole-Attachment Arrangements Between Electric Utilities and ILECs Have Become Obsolete

Throughout much of the 20th century, ILECs and electric companies established joint-use agreements based upon the concept of parity, ensuring equitable compensation through both balanced ownership of the total number of joint-use poles in a given area and an appropriate apportionment of space according to each party's needs.[4] As the electric utilities acknowledge, "the parties were mutually advantaged by the joint-use arrangement, no party was subsidizing the other, and no money would need to change hands between the parties."[5]

Under traditional joint-use arrangements, if the ILEC were allocated 45% of the space on a joint-use pole (as was common), for each pole attachment that it placed, the ILEC would pay a rental fee equal to 45% of the total carrying cost of the pole.[6] In addition, to avoid making any net payments to one another, the parties generally sought to maintain a corresponding balance in the number of poles each owned in a given area, so that the ILEC allocated to 45% of the space on a joint-use pole would also have to

[3] 47 C.F.R. § 1.407.
[4] *See also* Joint Opposition of American Electric Power Service Corporation, Duke Energy Corporation, WPS Resources Corporation, and Xcel Energy Inc. at 13, 18.
[5] *Id.* at 18.
[6] The other party would pay a corresponding rental fee equal to its percentage of space used, *i.e.* 55% of the total carrying cost for the pole.

maintain ownership of 45% of all the joint-use poles. Under this arrangement, the ILEC using and paying for 45% of the cost of each pole would pay rental rates for attaching to the remaining 55% of the poles owned by the electric company, and the electric company paying for 55% of the cost of each pole would pay rental rates for attaching to 45% of the poles owned by the ILEC, thereby ensuring no net payment. Only when a party attached to more joint-use poles than its allocated number would that party have to make a net rental payment to the other.

As the electric utilities recognize, these joint-use agreements, many of which are decades old, still govern the pole-attachment relationship with the ILECs.[7] But what they fail to acknowledge is that the real world circumstances have now changed so substantially that what used to be a fair and equitable arrangement has now become irrational and indefensible. At the same time, as discussed below, pole ownership ratios have become skewed to the point that electric utilities have unprecedented bargaining leverage over ILECs. As a result, those utilities not only refuse to adapt obsolete pole attachment arrangements from which they benefit enormously to current realities, but are actually demanding substantial rate increases which ILECs must pay in order to meet their carrier of last resort obligations.

The most significant change that has rendered traditional joint use agreements obsolete is that ILECs need and can actually occupy far less pole space than was assumed and provided for in these agreements, while electric utilities now occupy *more* space. Indeed, in the wake of the 1996 Act, CLECs have joined cable companies in using pole

[7] *See* Opposition of FirstEnergy at 3, 13 ("agreements have been in place for 50 years or more;" "many of FirstEnergy's joint-use agreements with ILECs extend back to the 1950's or earlier."); Comments of the United Telecom Council and the Edison Electric Institute at 13, 17 ("many of the joint-use agreements have been in place for decades...;" "a large number of agreements [have] been in place for more than 25 years."). AT&T currently operates under many of these archaic agreements, some dating back to the 1930s.

space that, under the still applicable joint-use agreements, is supposed to be shared by only two users. Today, as the Commission has recognized, it is not uncommon for urban poles to have as many as five users.[8] Moreover, cable television systems and CLECs are generally required to attach in the portion of the pole designated for telecommunications use – *i.e.*, the space originally allocated to, *and paid for* by, ILECs such as AT&T under the historic joint-use agreements.[9]

The addition of CLECs and cable operators to pole space previously allotted to and paid for by ILECs coincides with a decline in space actually needed by ILECs. Traditional joint-use agreements typically allocated three to four feet of space to the ILEC on a 35-foot standard joint-use pole. As a result of recent technological innovations,[10] however, ILECs now generally require much less space for their own attachments. For example, the results of a recent pole survey conducted in Indiana show that AT&T is occupying, on average, approximately 1.75 feet of space on each pole to which it is attached. Conversely, many electric companies have increased their space usage to accommodate larger electrical transmission equipment.[11] Some electric company facilities now occupy as much as eight feet of pole space, and as the FCC has noted, the separation space on a pole is usable by them as well.[12]

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[8] *See* 47 C.F.R. §1.1417 (establishing presumptive average number of attaching entities at five in urban areas).

[9] Many historic joint-use agreements provide that the pole owner collects the revenue from third party attachments to its poles, regardless of where such attachments were made on the pole. This means that the electric company often collects attachment fees from cable television providers and CLECs with attachments in the 3' space assigned to the ILEC on joint-use poles owned by the electric company. AT&T typically does not obtain a symmetrical benefit on the joint-use poles it owns because third parties generally do not attach to the portion of the pole utilized by the electric companies.

[10] *See* Comments of BellSouth, Attach. A at 6-7.

[11] *Id.*

[12] *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, Memorandum Opinion and Second Report and Order, 72 FCC 2d 59, ¶ 24 (1979).

As a result of these developments, ILECs now have access to less space and have less need for space on joint-use poles than was historically the case, while electric companies use more space. But electric companies not only have consistently refused to renegotiate agreements predicated on different allotments but have sought to impose substantial rate increases and other fees. ILECs, for their part, remain dependent on electric utilities for their pole attachments and often have no choice but to accede to the demands of the electric utilities.

II. Electric Companies Have Substantial Leverage To Force ILECs to Accept Rates, Terms, and Conditions That Are Unjust and Unreasonable

Were the market for pole-attachments functioning properly, AT&T would certainly prefer negotiating private contracts over Commission regulation. But electric companies now exercise so much leverage over access to poles that commercial negotiations can no longer guarantee the just and reasonable rates, terms, and conditions that the Act requires. AT&T agrees with those commenters who argue that, without Commission intervention, this trend will continue.[13] While some electric company commenters claim that both ILECs and electric companies have equal bargaining power because they are both dependent on the other for access to the other's poles,[14] this assessment ignores the other significant developments that have dramatically transformed the pole-attachment environment. At the very least, the drastically different accounts of the nature of the current pole-attachment marketplace warrant further investigation by the Commission through the proposed rulemaking process. Specifically, the change in the space occupied by ILECs and electric utilities discussed above has been accompanied by

[13] *See e.g.* Comments of BellSouth at 11 (describing result of unequal bargaining power); Comments of Alltel at 2 (noting "distortion" in the telecommunications marketplace).
[14] *See e.g.* Opposition of FirstEnergy at 12; Comments of United Telecom Council and the Edison Electric Institute at 14.

a change in pole ownership ratios that has given electric utilities bargaining leverage they had not previously enjoyed and that often renders fair commercial negotiations impossible.

AT&T's experience certainly confirms that the playing field is no longer level. In every state in which AT&T attaches to others' poles, AT&T attaches to far more electric company poles than the electric companies attach to AT&T's poles. For example, in Texas, the electric companies own approximately 63 percent of the joint-use poles and AT&T owns 37 percent.[15]

The electric companies concede these disparities but claim that they are solely the result of AT&T's refusal to place additional poles.[16] In fact, a number of factors outside of AT&T's control are responsible for the decrease in the relative number of poles that AT&T owns. For example, power companies are generally the first utilities invited into new residential developments, where they place new poles. AT&T has been hampered in its ability to make up for lost pole percentages because, once poles are placed in a particular community, many municipalities will not support the placing of duplicative poles. The electric utilities also routinely place or replace poles without AT&T's knowledge. As a result, the number of new electric company poles has increased substantially in recent years, thereby distorting the historical ratios on which the joint-use arrangements were established.

As pole ownership ratios have become increasingly skewed, so too has the parity that once characterized ILEC and electric utility bargaining power. Indeed, electric utility claims regarding the *reasons* for the changed pole ownership ratios are not only

[15] Electric utility commenters report similar gaps in ownership. *See e.g.* Comments of the United Telecom Council and the Edison Electric Institute at 18 (example of electric utility that owns 85% of poles); Opposition of FirstEnergy at 3 & 4 (FirstEnergy owns 65% of poles).
[16] *See e.g.* Opposition of FirstEnergy at 12-13 & n.25.

incorrect, but wholly beside the point because the undeniable fact is that ILECs are now far more dependent on electric utility poles than vice versa and, as a result, electric utilities have unmatched and unprecedented bargaining leverage with respect to the terms and conditions on which they allow ILECs to attach to their poles.

Electric utilities are, moreover, increasingly abusing this bargaining leverage. Knowing the Commission does not currently afford ILECs the same treatment as similarly situated CLECs or cable television providers, electric companies refuse to negotiate appropriate arrangements that reflect the current environment or simply impose unilateral rate increases with impunity. For example, an electric company in Texas recently attempted to raise AT&T's rates by more than 600% and sought to maintain the same 45% to 55% pole-ownership ratio that has been obsolete for decades now. The electric company has even refused to allow AT&T to purchase poles as a means of rebalancing the relative ownership numbers.

In their comments, the electric companies attempt to justify their large rate increases by suggesting that the ILECs respond by raising their rates by a comparable amount.[17] While it is true that most of the existing joint-use agreements allow one party to raise its rates in response to comparable increases by the other, AT&T's experience is that electric companies are the ones who initiate these increases. Moreover, because the ILECs attach to more poles owned by the electric companies than vice versa, these rate increases create an even greater net rental payment to the electric companies from the ILECs.

[17] *See* Comments of United Telecom Council and the Edison Electric Institute at 14; Joint Opposition of American Electric Power Service Corporation, Duke Energy Corporation, WPS Resources Corporation, and Xcel Energy Inc. at 17.

Many electric companies are simply unwilling to engage in reasonable negotiations over the terms of these pole attachments. Because ILECs appear to be unable under the existing Commission's rules to initiate a complaint against them, often the only avenue left to ILECs is to terminate the contract. But that would have potentially devastating consequences for their ability to maintain existing plant and services or to deploy new plant. Indeed, the ILECs' carrier-of-last-resort obligations effectively prevent the ILECs from exercising the only bargaining option they often have. Without the ability to force the electric utilities to bargain in good faith, the ILECs – unique among all attaching entities – will continue to pay rates that are unjust and unreasonable.

III. CONCLUSION

The Commission should grant USTelecom's petition and institute a rulemaking, so that if these trends continue, the Commission will be in a position to exercise its authority to address these public policy concerns and reestablish a competitively neutral marketplace for all providers of telecommunications services.

Respectfully submitted,

/s/ Gary L. Phillips

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